United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

74-2478

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To be argued by
ROBERT POLSTEIN

United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

against

PETER BECKERMAN,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT,
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 74-8365

UNITED STATES OF AMERICA,

Appellee,

-against-

PETER BECKERMAN,

Defendant-Appellant.

On Appeal from the United States District Court
For the Southern District of New York

APPELLANT'S BRIEF

QUESTION PRESENTED

Would a retrial of this defendant, following the Court's sua sponte declaration of a mistrial without defendant's consent, violate his Fifth Amendment right not to "twice be put in jeopardy" for the same offense?

PRELIMINARY STATEMENT

This is an appeal from the denial of a motion to dismiss the indictment on the ground that further prosecution would violate the Constitutional prohibition against double jeopardy.

Appellant is charged, in a one-count indictment, with possession with intent to sell approximately 28 grams of cocaine, in violation of Title 21 U.S.C. §§ 812, 841(a)(1) and 841 (b)(1)(A). After a three-day trial the jury spent only four hours in actual deliberations before indicating that they might be deadlocked. When the trial court (Motley, J.) inquired whether that meant that the jury would be unable to ever reach a verdict, the forelady replied in a strikingly ambiguous manner (A32)*. The court immediately discharged the jury, despite defense counsel's request that the panel again be charged as to burden of proof and sufficiency of evidence.

The case was reassigned to Judge Richard Owen for retrial. Defendant moved to dismiss the indictment upon the grounds that Judge Motley had abused her discretion by precipitously discharging the jury and that, under the circumstances, a retrial would constitute double

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* References to appellant's Appendix are preceded by "A"; references to the trial transcript are preceded by "R".

jeopardy (A4-17). Judge Owen referred the motion back to Judge Motley who orally denied it from the bench (A73-A75). Defendant appeals from the written order filed upon such decision (A76).

STATEMENT OF FACTS

Defendant, a 25-year-old real estate broker with no previous criminal conviction (R249, 251, 303), was charged in a one-count indictment with possession with intent to sell approximately 28 grams of cocaine. His defense was entrapment. The entire trial -- from commencement of jury selection until the Judge declared a mistrial -- took three days. At approximately 9:25 p.m. in the evening of the third day, the jury sent in a note that read, "We the jury are deadlocked" (A32). The jury was brought into the courtroom and the following colloquy took place:

> "THE COURT: Ladies and gentlemen I have your note which reads 'We the jury are deadlocked.'
>
> Does that mean that you are not able to reach a verdict, and the question I want to put to you whether you feel with a little more time you might be able to reach a verdict?
>
> THE FORELADY: It is very hard to say. We are all very tired at this time and our biggest problem is we don't think we have enough evidence and this is our biggest

hassle and maybe another time, another day we may be clearer.

THE COURT: The question I asked you was whether you thought with more time you would be able to reach a verdict, so the answer is no, is that it?

THE FORELADY: The way it seems now, it doesn't seem as though we will be able to.

MR. POLSTEIN: May I make a suggestion?

THE COURT: No, you may not.

Thank you very much, the court is going to declare a mistrial, the jury is excused.

We have arranged for a bus to take you home. Are they going to be here at 10:00 o'clock?

The jury is excused.

MR. POLSTEIN: Before the jury is excused, in view of the forelady's statement to the Court, I would respectfully request the Court to read the jury again your charge on burden of proof. I think that the foreman or forelady of the jury has expressed to the Court a view of the jury that can be cleared up. This jury has been out since 2:35. You just heard that they felt they don't have enough proof. I wonder if you would charge them again with the quantum of proof.

THE COURT: The jury is dismissed.

(Jury leaves courtroom.)" (A32)

We claim that the trial court's summary discharge of the jury, in the absence of defendant's consent and over his attorney's protests, was an abuse of discretion. In order to put the court's declaration of

a mistrial in proper perspective, it is necessary to allude briefly to the facts that were established on trial.

The Government alleged that on the evening of September 18, 1973, defendant visited the apartment of one Mary Adler, at which time he had a small quantity of cocaine in his possession. Present in the apartment was Special Agent Meale, of the Drug Enforcement Agency, who attempted to purchase the cocaine from defendant. Defendant refused to sell it to him, no money changed hands, defendant never relinquished possession of the cocaine, and the undercover agent left Mary Adler's apartment empty-handed. A short time later, defendant left the apartment. He was apprehended several blocks away by Meale's partner, Special Agent Lightcap, assisted by a New York City policeman, and the contraband was seized from him.

The prosecution's case consisted solely of the testimony of the two agents and the policeman. The agents claimed that on the night in question, while they were present in Adler's apartment, defendant had made two telephone calls, in which he had set up the appointment that culminated in his arrest. Over objection, they were permitted to testify as to prior conversations with

Adler, who it turned out was a paid Government informer (R31, 32, 46-47).*

Defendant testified in his own behalf at length. He described how Mary Adler had been importuning him repeatedly by telephone for over a week to obtain some cocaine for her (R267-270), and testified that on the night in question she had telephoned him three times at his place of business (R270-275). Two independent defense witnesses corroborated these facts (R216-221, 344-345).

Although Adler was actually present in the court anteroom, the trial prosecutor chose not to call her as a rebuttal witness (R213-214).

The court's charge and the jury's deliberations took place on a Friday afternoon. Following is the chronology:

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* As part of defendant's omnibus pre-trial motions for discovery and inspection, he requested the names of all undercover agents or informers "relevant to a defense of entrapment". The prosecution identified Special Agent Meale as the only Government agent involved, and the court did not direct further particularization. In reliance on the Government's representation, defense counsel spoke with Miss Adler prior to trial and discussed the entrapment defense with her. She subsequently reported this conversation to the Assistant United States Attorney who conducted this prosecution (R113-115). It was not until cross-examination of the special agent that the defense discovered, for the first time, that Adler was a paid Government informer (R73, 74, 150, 155) (A9-10).

1:30 p.m. -- Charge of the court (A45).

2:35 p.m. -- Jury commenced deliberations (A19).

3:20 p.m. -- Jury sent in a note stating that they "would like to hear the Judge's charge in regard to Mary Adler" and for the next 20 minutes the court repeated that portion of its charge (A20-28).

3:40 p.m. -- Jury retired to deliberate.

5:35 p.m. -- Jury sent in a note requesting to have testimony reread "in regard to phone calls to Mary Adler by Mr. Beckerman in Mary Adler's apartment" (A28), and for approximately the next hour that testimony was reread (A28-30).

6:30 p.m. -- Evening dinner recess (A30).

8:00 p.m. -- Jury resumed deliberations (A30).

9:15 p.m. -- Note received from the jury reading, "We the jury are deadlocked" (A30-31).

9:25 p.m. -- Jury brought into courtroom and mistrial declared (A31-33).

Thus, the record reflects that the time spent by the jury in actual deliberations in the jury room was

only four hours -- 45 minutes between 2:35 and 3:20 p.m., 1 hour and 55 minutes between 3:40 p.m. and 5:35 p.m., and 1 hour and 15 minutes between 8:00 p.m. and 9:15 p.m.

After receipt of the jury's last note, the Government requested a modified Allen charge, pointing out that "they have only been deliberating a little over three hours" (A31). The court denied the request and brought the jury into the courtroom (A32). In answer to the court's query as to whether the jury was deadlocked, the forelady replied:

> "It is very hard to say. We are all very tired at this time and our biggest problem is we don't think we have enough evidence and this is our biggest hassle and maybe another time, another day we may be clearer" (A32).

Defense counsel immediately asked whether he could "make a suggestion" (A33). Although the court denied that request and immediately declared a mistrial, before the jury was excused defense counsel heatedly requested that the charge of burden of proof be reread (A33). That request was also denied, and the jury was summarily discharged (A33).

After the forelady's very equivocal answer the court did not inquire whether with a little more time the jury could reach a verdict, did not ask whether the reported deadlock was hopeless, did not poll the individual

jurors, did not solicit the views of either counsel, and gave neither the prosecution nor the defense an opportunity to object to the declaration of a mistrial.

POINT I

In The Absence Of Any "Manifest Necessity", The Trial Court's Sua Sponte Declaration Of A Mistrial Bars A Retrial

This case presents a serious question as to the application of the Fifth Amendment mandate that no person shall "twice be put in jeopardy" for the same offense.

The law is well settled that once a defendant goes to trial before a jury he is in "jeopardy", and if that jury is discharged without his consent he cannot again be tried upon the same charge. Wade v. Hunter, 336 U.S. 684 (1949); Kepner v. United States, 195 U.S. 100 (1904). Because a defendant has a "valued right to have his trial completed by a particular tribunal" (Wade v. Huner, supra) a court may not declare a mistrial without his consent unless there is a "manifest necessity for the act, or the ends of public justice would otherwise be defeated." United States v. Perez, 22 U.S. 579 (1824). In the century and a half since the seminal Perez decision judicial definitions of "manifest necessity" have had the

practical effect of steadily narrowing the discretion of a trial judge to declare a mistrial sua sponte.

Thus, in United States v. Jorn, 400 U.S.470 (1971) a plurality of the Supreme Court, speaking through Mr. Justice Harlan, held that whenever the trial court abuses its discretion in granting a mistrial on its own motion, jeopardy finally attaches and there can be no further adjudication. As Justice Harlan said:

> "In the absence of such a motion [by defendant for a mistrial] the Perez doctrine of manifest necessity stands as a command to trial judges not to foreclose the defendant's option until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings . . ."
>
> * * *
>
> ". . . even in circumstances where the problem reflects error on the part of one counsel or the other, the trial judge must still take care to assure himself that the situation warrants action on his part foreclosing the defendant from a potentially favorable judgment by the tribunal."
>
> * * *
>
> "Alternatively, the judge must bear in mind the potential risks of abuse by the defendant of society's unwillingness to unnecessarily subject him to repeated prosecutions. Yet in the final analysis, the judge must always temper the decision whether or not to abort the trial by considering the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal

he might believe to be favorably disposed to his fate." 400 U.S. 485-486 (emphasis added).

Likewise, in Downum v. United States, 372 U.S. 734 (1963), in dismissing an indictment upon grounds of double jeopardy after a prior mistrial, the Supreme Court held:

> "The discretion to discharge a jury before it has reached a verdict is to be exercised only in very extraordinary and striking circumstances . . . for the prohibition of Double Jeopardy is not against being twice punished, but against being twice put in jeopardy" (372 U.S. at 736)

and went on to declare:

> "We resolve any doubt 'in favor of the liberty of the citizen, rather than exercise what would be an unlimited, uncertain, and arbitrary judicial discretion'" (372 U.S. at 738).

In United States v. Lansdown, 460 F.2d 164 (4th Cir., 1972), wherein defendant's motion to dismiss an indictment upon grounds of double jeopardy was granted because of the trial court's sua sponte declaration of a mistrial, the court held:

> "The double jeopardy 'prohibition is not against being twice punished, but against being twice put in jeopardy.' United States v. Ball, 163 U.S. 662, 669, 16 S.Ct. 1192, 1194, 41 L.E. 300 (1896). Indeed, the Supreme Court has stated that the 'underlying idea' of the double jeopardy clause is that the 'State with all of its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him

> to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.' Green v. United States, 355 U.S. 184, 187, 78 S.Ct. 221, 223, 2 L.Ed.2d 199 (1957); accord United States v. Jorn, 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971)." (460 F.2d at 171).

Here, in denying defendant's post-trial motion to dismiss this indictment, Judge Motley relied upon the brevity of the testimony and cited the alleged simplicity of the factual issues (A73-74). We submit that the Trial Court's reliance upon such factors in justification of its sua sponte declaration of a mistrial was misplaced. Appellate courts recognize the impossibility of establishing rigid rules based upon either the complexity of the trial or the length of deliberations and, in attempting to determine whether or not "manifest necessity" exists, have been unable to establish any mechanical formulae or dictate any finite time limitations to be applied in the tense arena of the courtroom. The Supreme Court has "for the most part, explicitly declined the invitation of litigants to formulate rules based on categories of circumstances which will permit or preclude retrial" (United States v. Jorn, supra, at p. 480).

For example, in United States v. Lansdown, supra, defendant's motion to dismiss the indictment upon grounds of double jeopardy was granted because of the trial court's sua sponte declaration of a mistrial. That case involved a one-count bank robbery indictment, was tried in less than a day, and the jury was sent home for the night after deliberating for approximately one and a half hours. Deliberations continued for about seven and a half hours the next day, at which time the court was informed that the jury was deadlocked. The judge then gave an Allen charge, sent the jury out to resume deliberations, and a short time later excused them for a second night. After three hours of deliberations on the following morning the judge declared a mistrial, despite the jury foreman's statement that it was on the verge of a verdict. Defense counsel requested that the jury be given a little more time, but the judge refused on the grounds that it had had more than ample time ". . . to decide one question, and there is only one question, and it is very simple . . . this man was either a perpetrator of that bank robbery . . . or he wasn't." The Court of Appeals held that the trial court's sua sponte declaration of a mistrial under those circumstances was an abuse of discretion inasmuch as the jury had not specifically stated that it was hopelessly deadlocked, and went on to say:

> "The conclusion that a jury is unable to reach a verdict must be supported by something additional than the trial court's conclusion that the jury has deliberated long enough" (460 F.2d at 169).

Gauged by the judicial parameters based on the Perez doctrine, the record below is barren of any "manifest necessity" or "very extraordinary and striking circumstances" to justify Judge Motley's declaration of a mistrial. Nothing occurred in this trial to support the conclusion that the jury was so hopelessly deadlocked as to be unable ever to reach a verdict. In fact, the forelady's statement clearly indicated that ". . . maybe another time another day we may be clearer" (A32)(emphasis added). The Trial Court responded:

> "The question I asked you was whether you thought with more time you would be able to reach a verdict, so the answer is no, is that it?" (A32-33)(emphasis added).

Even in the face of this judicial "suggestion", the forelady still equivocated by answering, "The way it seems now, it doesn't seem as though we will be able to" (A33) (emphasis added). Nevertheless, and despite defense counsel's immediate application to be heard, Judge Motley summarily discharged the jury, stating:

> "I asked the forelady whether she thought with a little more time they could reach a verdict and of course she went too far but certainly the essence of it was they could not." (A33).

This was not at all the "essence" of what the forelady had said -- and by discharging this jury Judge Motley disregarded the Supreme Court's admonition in Jorn that:

> ". . . the trial judge must still take care to assure himself that the situation warrants action on his part foreclosing the defendant from a potentially favorable judgment by the tribunal . . ." (400 U.S. at 485).

In determining whether a trial court's sua sponte declaration of a mistrial bars a retrial, appellate courts look to whether the mistrial resulted in a benefit to the prosecution or to the defendant. Thus, in Gori v. United States, 367 U.S. 364 (1961), the Supreme Court held that a defendant was not entitled to double jeopardy protection when the trial judge discharged the jury sua sponte because of prosecutorial misconduct. As the Supreme Court stated in Green v. United States, 355 U.S. 184, 188 (1957):

> "This [constitutional proscription against double jeopard/] prevents a prosecutor or judge from subjecting a defendant to a second prosecution by discontinuing the trial when it appears that the jury might not convict."

The logic of those decisions is clear. If the trial judge avoids an improper conviction in order to protect the defendant's rights, then the defendant should not be able to use such solicitude for his welfare as a bar to a retrial. On the other hand, where the trial judge on his own volition declares a mistrial in order to protect

the Government or its witnesses, then the Fifth Amendment bars further prosecution. United States v. Jorn, supra; Downum v. United States, supra; Wade v. Hunter, supra.

This Circuit, in its most recent pronouncement in the area, United States v. Glover, No. 74-1739 (2d Cir., decided October 4, 1974), went beyond Gori, and held that a mistrial that benefitted neither the prosecution nor the defendant barred a subsequent prosecution. As this Court stated in Glover:

> "The thrust of the opinion [Wade v. Hunter] is that where the mistrial is not motivated for the benefit of the defendant, and the defendant has done nothing himself to create the problem, he is entitled to his double jeopardy protection" (page 43 of the slip sheet opinion).

The facts herein support a double jeopardy bar of further prosecution far more than did those in Glover. A retrial upon this indictment would fly in the face of the possibility -- indeed, the probability -- that the defendant might well have been acquitted if this jury had been allowed to continue its deliberations. In response to the judge's initial inquiry as to whether the jury was deadlocked, the forelady replied, ". . . our biggest problem is we don't think we have enough evidence . . ." (A32). This response certainly telegraphed the probability that the Government had failed to prove defendant's guilt beyond a reasonable doubt. By the trial court's

precipitous action, however, Beckerman lost "his option to go to the first jury and, perhaps, end the dispute then and there with an acquittal" (United States v. Jorn, supra, at 484).

Defendant had already run the gauntlet, and the jury didn't think that it had "enough evidence". Obviously, the Government's use of Mary Adler in trapping defendant sorely bothered the jury. Their only two requests for review of trial testimony and rereading of the court's charge dealt with Mary Adler's role. The trial prosecutor made a conscious decision not to call this necessary Government witness at the first trial, and his proof was found wanting. Now, during this post-jeopardy period, the prosecution has an opportunity to strengthen its case. We submit that the Government gambled and lost, and should not now be permitted to shore up its sagging case upon a second trial.

Moreover, this Court's decision in United States v. Goldstein, 479 F 2d 1061 (2d Cir., 1973), cert. denied, 414 U.S. 873 (1973), does not apply to the facts of this case. There, this Court based its decision, in part, upon the finding that defense counsel had implicitly consented to the mistrial by moving therefor and never retracting their request (479 F.2d at 1066). Here, by contrast, defense counsel never asked for, agreed to, nor even

implicitly participated in, the discharge of the jury. Indeed, as soon as the forelady announced that the jury felt it lacked sufficient evidence to reach a verdict, he immediately asked, "May I make a suggestion?" (A33). The court responded, "No, you may not" and immediately declared a mistrial (A33). However, before the jury was excused from the courtroom, defense counsel again implicitly objected to the mistrial by requesting an additional charge on quantum of proof (A33). The court's only response was the flat statement, "The jury is dismissed" (A33). By no stretch of the imagination could this exchange between court and defense counsel be deemed to amount to either a request for, or acquiescence in, the declaration of a mistrial.

In fact, the trial judge's action was so hasty and peremptory that defense counsel was effectively precluded from exercising a considered objection to the jury discharge. Accordingly, the Supreme Court's description of the trial judge's conduct in Jorn applies with equal force to Judge Motley's actions in aborting this trial:

> "It is apparent from the record that no consideration was given to the possibility of a trial continuance; indeed, the trial judge acted so abruptly in discharging the jury that, had the prosecutor been disposed to suggest a continuance, or the defendant to object to the discharge of the jury, there would have been no opportunity to do so. When one examines the circumstances surrounding the

> discharge of this jury, it seems abundantly apparent that the trial judge made no effort to exercise a sound discretion to assure that, taking all the circumstances into account, there was a manifest necessity for the sua sponte declaration of this mistrial. United States v. Perez, 9 Wheat., at 580. Therefore, we must conclude that in the circumstances of this case, appellee's reprosecution would violate the double jeopardy provision of the Fifth Amendment." (United States v. Jorn, supra, at p. 487).

Further, there were a number of alternatives that the trial court below could have followed "to assure [her] self that the situation warrants action on [her] part foreclosing the defendant from a potentially favorable judgment by the tribunal" (United States v. Jorn, supra, at 486). The court could have given the Allen charge that the prosecution requested and to which the defense did not object (A31). When the forelady stated ". . . we don't think we have enough evidence . . .", the court could have repeated the charge on burden of proof (A32). When the jury reported that it was deadlocked, the court could have inquired whether the division was hopelessly irreconcilable. Certainly, when the forelady announced, ". . . maybe another time, another day we may be clearer", the court could have asked whether further deliberations would be helpful. The court could have polled the individual jurors to ascertain whether further deliberations could have resulted in a verdict.

At the very least, she could have conferred with counsel to discuss the advisability of a continuance. See: United States v. Lansdown, supra; United States v. Castellanos, 349 F.Supp. 720 (E.D.N.Y., 1972); United States v. Medina, 323 F.Supp. 1277 (E.D. Pa., 1971). The court below, however, failed to explore such alternatives.

Here, the court refused the prosecutor's request for an "Allen" charge, disregarded defense counsel's protestations, refused defense counsel's request to recharge the jury as to burden of proof, ignored the forelady's statement that with more time a verdict might be reached, failed to poll the jury as to whether it was actually deadlocked and on its own motion dismissed the jury. Under those circumstances, the trial court's finding that the jury was so hopelessly deadlocked as to mandate a mistrial violated the "manifest necessity" requirement of the Perez doctrine. Accordingly, a retrial of defendant is barred by the double jeopardy prohibition.

CONCLUSION

The order appealed from should be reversed and the indictment herein should be dismissed.

Dated: New York, New York
December 27, 1974

Respectfully submitted,

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Due and timely service of TWO copies of the within BRIEF is hereby admitted this 26TH day of DECEMBER 1974

12-26-74 [signature]

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